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Morrow



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: New Life Group, Inc.

File: B-247080.2

Date: May 22, 1992

Alfred A. Cave for the protester.
W.H. Campbell and Timothy A. Chenault, Esq., United States Coast Guard, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest allegation that the contracting agency improperly delayed contract performance in order to provide the awardee with the opportunity to establish responsibility under an invitation for bids, issued under the Small Business Administration (SBA) section 8(a) set-aside program, is denied where the delay was to allow compliance with Federal Acquisition Regulation § 19.809, which requires that the awardee's responsibility be referred to SBA for its review, and where the invitation for bids permitted the contract start date to be delayed.

DECISION

New Life Group, Inc. protests the award of a contract for janitorial services to Classico Cleaning Contractors, Inc., under invitation for bids (IFB) No. DTCG84-91-B-3SG002, issued by the United States Coast Guard. The procurement was conducted competitively pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) ((1988) and (Supp. I 1989)).¹ New Life contends that the Coast Guard improperly

¹Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. Federal Acquisition Regulation (FAR) § 19.805 and 13 C.F.R. § 124.311 (1992) provide for and govern competitively awarded contracts set aside for section 8(a) qualified concerns. We review competitive 8(a) procurements to ensure that they conform to applicable

delayed award in order to allow Classico the opportunity to establish responsibility.

We deny the protest.

On August 13, 1991, the Coast Guard issued the IFB to obtain a contractor to provide janitorial services at Governors Island, New York, under a firm, fixed-price contract. The term of the contract was to be from date of award or October 1, 1991, whichever was later, through September 30, 1992, with 1 year options to September 30, 1996. On September 13, the Coast Guard received five bids in response to the IFB. In accordance with FAR § 19.805-2, the SBA determined the apparent low bidder to be ineligible.

On October 31, the Coast Guard determined Classico, who had submitted the second low bid at \$8,491,808.41, to be the apparent low responsive responsible bidder. The Coast Guard sought SBA approval of the award effective December 1. The SBA declined its immediate approval because of concerns regarding the adequacy of Classico's financial resources, although it recognized that Classico was an eligible 8(a) firm. During a November 26 meeting with the Coast Guard, the SBA and Classico indicated that Classico did not have adequate financial resources to perform the contract effective December 1, but that such resources could be obtained. By letter hand delivered to SBA on December 2, the Coast Guard revised the contract start date to January 1 and directed SBA to definitively determine the eligibility and responsibility of Classico by no later than December 23. On December 18, SBA advised the Coast Guard that Classico could perform the contract effective January 1 because it had secured adequate financing. Award was made to Classico on December 20, 1991.

New Life, the incumbent contractor for these services, submitted the third low bid at \$8,970,431.13. During the period in which SBA was determining the eligibility and responsibility of Classico, New Life agreed to grant the Coast Guard extensions under the prior contract. On December 20, after learning of the award to Classico, New Life filed this protest. On December 31, the Coast Guard proceeded with performance under the Classico contract, notwithstanding the protest, determining such action was in the best interest of the government. See FAR § 33.104(c).

federal procurement regulations. See Morrison Constr. Servs. Inc., 70 Comp. Gen. 139 (1990), 90-2 CPD ¶ 499; Southwest Resource Dev., B-244147, Sept. 26, 1991, 91-2 CPD ¶ 295.

New Life contends that the Coast Guard improperly delayed contract performance in order to permit Classico to become responsible, and that Classico could not be found a responsible contractor as of the original contract start date of December 1. Classico asserts that the ability to perform as of the advertised start date constituted a definitive responsibility criterion, and maintains that, by revising the contract start date, the Coast Guard misapplied a definitive responsibility criterion and provided Classico preferential treatment. New Life also alleges that the Coast Guard misled New Life into granting the final extension under its prior contract by leading it to believe that it would receive the award if it granted the extension.

The Coast Guard's referral of the question of Classico's responsibility to the SBA was required by FAR § 19.809. That section requires the contracting agency to refer the question of whether an 8(a) contractor is competent and responsible to perform an 8(a) contract to SBA for consideration whenever the contracting officer learns of information prior to award that raises substantial doubt as to the 8(a) firm's ability to perform the contract. The section further provides that the agency is authorized to proceed with award to another appropriately selected section 8(a) offeror only if SBA has not certified the section 8(a) firm's competency within 15 working days or a longer mutually agreeable period.

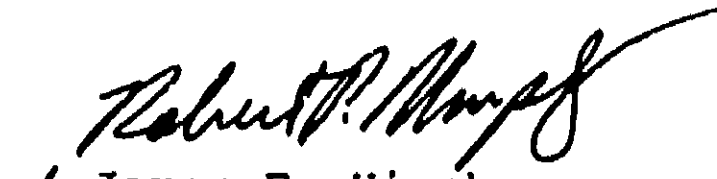
Here, the contract start date was revised twice in order to comply with the FAR § 19.809 requirement that SBA determine whether Classico was competent and responsible to perform as SBA's subcontractor. Since the SBA was unwilling to approve the award because Classico's responsibility was in question, the Coast Guard's decision to revise the start date in order to permit the SBA the opportunity to consider the matter was proper. That is, the delay in award to January 1 to allow Classico the opportunity to obtain adequate financing was mutually agreed to by the Coast Guard and SBA as contemplated by applicable regulations. See also Base-Operation-Mgmt.-Serv. Inc., B-218223, Feb. 26, 1985, 85-1 CPD ¶ 242 (agency may delay award for a reasonable period of time to permit a low bidder to cure problems concerning its responsibility). Moreover, the contract start date was not fixed at October 1, as contended by New Life, but could be extended for reasonable periods of time for such reasons as permitting a low bidder an opportunity to obtain the ability to perform the contract. See FAR §§ 12.102(a), 12.103.

New Life argues that the Coast Guard's actions with respect to the start date resulted in the misapplication of definitive responsibility criteria. We disagree. A definitive responsibility criterion is an objective standard, such as a specific number of years of particular specified experience,

established by the agency to measure an offeror's ability to perform the contract, Action Serv. Corp., B-246413; B-246413.2, Mar. 9, 1992, 92-1 CPD ¶ 267. Here, the contract start date was not an objective standard for measuring performance under the contract, but rather was a material provision of the contract, which by its own terms was flexible.

New Life also asserts that the delay in the award date evidenced bad faith or preferential treatment by the Coast Guard. However, as indicated above, the record shows that the Coast Guard acted in accordance with applicable regulations and as requested by SBA--which is vested with the stewardship of the section 8(a) program. While New Life (and even the Coast Guard) may have believed that New Life would receive the award if it extended its prior contract because of the concerns relating to Classico's finances, New Life was not promised the award; to the contrary, New Life admits that it granted the extension because it thought it was unlikely that Classico would obtain financing.

The protest is denied.


for James F. Hinchman
General Counsel